IN THE
SUPREME COURT OF THE
UNITED STATES

October Term 1942.

No.

DWIGHT D. CLARKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and filed on December 30, 1942 (R. 530), rehearing denied February 6, 1943. (R. 532.)

II.

JURISDICTION.

1. The judgment to be reviewed was entered on December 31, 1942. (R. 531,) Petition for rehearing was denied February 6, 1943. (R. 532.) The time to apply for a writ of certiorari runs from February 6, 1943.

Morse v. United States, 270 U. S. 151, 153.
Craig v. United States, 298 U. S. 637.

2. The federal courts have jurisdiction to determine issues arising out of the construction of federal statutes. Sec. 41, Title 28 U. S. C. A.; (Judicial Code, Sec. 24, par. 1.) Appeal to the Circuit Court of Appeals was taken in pursuance of the provisions of Sec. 225, Title 28 U. S. C. A. (Judicial Code, Sec. 128).

3. This court has jurisdiction to reverse the judgment of the Circuit Court of Appeals, Sec. 347, Title 28 U. S. C. A.; (Judicial Code, Sec. 240 (a)).

III.

STATEMENT OF THE CAE.

A summary statement of the case to determine the issue of jurisdiction has been given under heading "A" in the Petition. In the interest of brevity the statement will not be repeated here.

ARGUMENT.

Specification No. 1.

The Court erred in giving the following instruction:

> "The jury is further instructed that if they are convinced beyond a reasonable doubt from the evidence that the defendants or either of them, did devise a scheme or artifice or joined in a scheme or artifice to defraud Mrs. Hunter and did use or cause the mails to be used in connection therewith, that it is the duty of the jury in such event

to find such defendant or defendants, guilty of such count or counts, regardless of whether the jury might believe that Mrs. Hunter agreed to sell her Coca Cola stock to Mr. Drummey at 10% below the market on the sale date or agreed to sell through him as a broker, as in neither event would anyone have a right to defraud Mrs. Hunter."

To the instruction the petitioner duly excepted on the ground that it was an incorrect statement of law and not in conformity with the statute, which states specifically that the mails must be used in order to carry out or to further the particular scheme to defraud. (R. 492.)

The error assigned under this specification must be self-evident. There can be no quarrel with the principle that the gist of the crime of using the United States mails to carry out a scheme to defraud is the use of the mails. All the authorities are in accord. *Byron v. U. S.*, 273 Fed. 769. With respect to the mailing, both the statute itself and the decisions interpreting and construing it declare such mailing must be for the *purpose of executing a fraudulent scheme or attempting to do so.* The gravamen of the mailing is the specific purpose. Without such specific purpose, there is no offense. Incidental use of the mails or use without that specific purpose in mind does not violate the Postal Fraud Statute. *Stapp v. U. S.*, 120 F. (2) 898. "The significant fact is intent and purpose." *Byron v. U. S.*, 273 Fed. 769.

The vice of the instruction is that it is so broad it includes any and every mailing which might have the slightest possible connection with the scheme described, even though such mailing was not prompted by a purpose to execute the plan. It removes the element of purpose from the crime, and allows the jury to convict on less evidence than required by the statute. It lowers the standard of guilt and criminality by amending and modifying the statute. This was recognized by the Circuit Court of Appeals when it stated in its opinion, "the instructions when challenged, standing alone, are incorrect because they do not require that the mails be used for the purpose of executing the scheme or attempting so to do. There is no crime unless the mails were used for the purpose mentioned." (R. 529.) In short, the use of the mails must be purposeful and intentional to result in culpability.

It must be admitted that elsewhere in the charge, the trial court correctly instructed the jury respecting this matter. However, that cannot cure the error complained of.

Instructions are erroneous when they contain both a correct and an incorrect statement of law, unless it appears that the correct statement is meant to be a correction of the erroneous statement. Such instructions are apt to prevent the jury from giving due consideration to the evidence in the light of the correct

instructions, and it is impossible to ascertain which instruction the jury followed. Further, the jury should not—nay, it cannot—be required to determine which part of the contradictory instruction is correct. 23 Corpus Juris Secumdum 1307; *Nicola v. U. S.*, 72 F. (2) 780.

Not only was the erroneous statement not corrected, but, by reason of its position in the charge, it was constituted an enlargement and amendment of the instruction held to be correct by the Circuit Court of Appeals. (R. 530.) Moreover, it was emphasized and magnified by the trial court's refusal to modify or clarify when exception was taken thereto.

Your petitioner respectfully submits that such an instruction, described by the Circuit Court of Appeals as "incorrect" (R. 529) and "not a model of clarity with respect to the point urged" (R. 530), one which places no proper bounds upon the jury, deprived him of the fair and impartial trial granted and guaranteed by the laws of his land.

CONCLUSION AND PRAYER.

For the foregoing reasons it is respectfully urged that the petition in this case be granted and the judgment of the Circuit Court of Appeals for the Ninth

Circuit and United States District Court for the Western District of Washington, Northern Division, be reversed.

Respectfully submitted,

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